

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

DIRECTV U.S. DIRECTV HOLDINGS, LLC

and

Case 21-CA-039546

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, DISTRICT LODGE 947
AFL-CIO

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Submitted by:
Jean C. Libby, Counsel for the Acting General Counsel
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017
Jean.libby@nrlrb.gov

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I. INTRODUCTION

On December 13, 2011, the Honorable Gerald A. Wacknov, Administrative Law Judge, herein referred to as the ALJ, issued a decision in the above-captioned case in which he concluded that Respondent discharged employee Gregory Edmonds because of his union activity in violation of Section 8(a)(1) and (3) of the Act and that Respondent maintained certain rules in violation of Section 8(a)(1) of the Act.¹ As explained below, Respondent filed exceptions to the conclusion, among others, that Edmonds was discharged in violation of Section 8(a)(1) and (3) of the Act, and the Acting General Counsel filed limited exceptions to certain of the ALJ's conclusions.

In addition to alleging that Respondent discharged Edmonds because of his union activity in violation of Section 8(a)(1) and (3) of the Act, the complaint upon which the ALJ's findings and conclusions are based alleges that Respondent discharged Edmonds in violation of Section 8(a)(1) of the Act because of his protected concerted activity of complaining about working conditions. Finding that Edmonds' complaints included unprotected profanity, the ALJ dismissed this allegation. Counsel for the Acting General Counsel's filed an exception to this conclusion.²

¹ JD (SF)-45-11.

² In this regard, exceptions were also filed to the ALJ's failure to order that Edmonds be reimbursed an amount equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination as well as the ALJ's failure to order that Respondent submit appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

The complaint further alleges that Respondent unlawfully maintained several rules, including a rule restricting the use of company systems, equipment and resources. With the exception of the latter rule, the ALJ held that Respondent's rules restrict an employee's right to engage in Section 7 activity, in violation of Section 8(a)(1) of the Act. Respondent filed exceptions to the rules that the ALJ concluded were unlawful and Counsel for the Acting General Counsel filed an exception to the rule that the ALJ concluded was lawful.³ Assuming *arguendo* that the ALJ correctly concluded that Respondent's rules violate Section 8(a)(1) of the Act, Respondent also excepted to the ALJ's failure to conclude that it effectively remedied the rules' violation.

II. ISSUES PRESENTED

- (1) Whether the ALJ correctly concluded that employee Gregory Edmonds was discharged for engaging in union activity in violation of Section 8(a)(1) and (3) of the Act;
- (2) Whether the ALJ correctly concluded that Respondent's rules violate Section 8(a)(1) of the Act; and
- (3) Whether the ALJ correctly concluded that Respondent's disclaimers do not effectively remedy the violations of Section 8(a)(1) of the Act.

³ Counsel for the Acting General Counsel also excepted to the ALJ's relegation of the remedy for the rules' violations to the compliance stage.

III. STATEMENT OF FACTS⁴

A. EDMONDS' DISCHARGE

1. Respondent's Operations.

Respondent, a California corporation, is engaged in the business of providing digital television entertainment services via satellite. While its principal offices are located in El Segundo, California, it has facilities throughout the United States. (ALJD 2:7-9).⁵ Several facilities are located in Southern California, including at Rancho Dominguez and Riverside. Operations Manager Freddy Zambrano is in charge of the Riverside facility. (Tr. 339). He reports to Scott Thomas, Regional Director of Operations for Southern California. Thomas reports to Adrian Dimech, Vice President of Operations for Southern California. (Tr. 288).

Employees at the Riverside facility where Edmonds was employed are divided into teams of about 15 individuals depending on whether they install or service satellite receivers. In July 2010 about 50 individuals were employed as installers at the Riverside facility. (ALJD 2:40). Each team is headed by an individual who holds the title of Field Supervisor.

While service technicians are paid solely by the hour, installers are paid on a combined hourly and piecework basis. There are three different grades of

⁴ This statement of facts is also included in Counsel for the Acting General Counsel's brief in support of limited exceptions.

⁵ "ALJD" refers to the Administrative Law Judge's Decision. Citations will refer to the page number followed by the line numbers. The transcript will be referred to as "Tr." followed by the appropriate page number. General Counsel's exhibits will be referred to as "G.C. X" followed by the appropriate exhibit number and Respondent's exhibits will be referred to as "R. X" followed by the appropriate exhibit number.

minimum hourly pay, grades 11, 12 and 13. To be paid at Grade 13, which is the highest grade, an installer must be certified to install internet service. (Tr. 43; ALJD 2:43 et seq.). Installers are paid a certain specified amount for each completed installation. If the total amount an installer earns for the installations completed in a pay period exceeds his minimum base pay, which represents the total amount he would earn if paid at his designated hourly rate for the hours he worked in that pay period, then he is paid only on a piecework basis. Installers generally earn more than their minimum base pay and, therefore, are mostly paid on a piecework basis. However, if the total amount the installers earn for completed installations in a pay period is less than their minimum base pay, then they are compensated at their designated minimum hourly rates for the difference. (Tr. 41; ALJD 2:43 et seq.).

2. The Machinists' Union Files a Petition To Represent Rancho Dominguez Employees.

On March 8, 2010, the International Association of Machinists and Aerospace Workers, District Lodge 947, AFL-CIO, herein called the Union, filed a petition with the NLRB seeking to represent installers and service technicians at a nearby facility operated by Respondent in Rancho Dominguez, which is located in the Los Angeles metropolitan area about 50 miles west of Riverside. Soon after the petition was filed in Rancho Dominguez, Respondent began holding meetings to address its opposition to the Union. The first two meetings, which were held about two weeks apart, were conducted just for supervisors and

managers but they were followed by numerous meetings with employees. (Tr. 261; ALJD 4:n. 5).

3. Respondent Seeks To Identify Union Supporters At Rancho Dominguez.

In addition to conducting group meetings at Rancho Dominguez, Respondent also conducted one-on-one meetings with Field Supervisors to identify union supporters. In addition to meeting with attorney Lydia Cossi, Field supervisors also met with Adrian Dimech, Vice President of Operations for Southern California, in one-on-one meetings. Field Supervisor Noe Gallegos, whose testimony the ALJ credited, said that he was called to meet with Dimech in an office with the door closed. First promising him immunity, Dimech asked Gallegos to give him the names of union supporters on his team. Dimech also told Gallegos that if the Union was to come in, the site could possibly be closed and the work given to contractors. (Tr. 262; ALJD 4:n. 6).

4. The Union Wins the Election At Rancho Dominguez But The Region's Hearing Officer Recommends That The Election Results Be Set Aside.

An election was held on April 16, 2010. The Union won the election 85 to 80. Respondent filed objections to the election, claiming its field supervisors solicited union authorization cards. On May 11, 2010, the Regional Director for Region 21 issued a Report on Objections and Order Directing Hearing. On July 4, 2010, after conducting a hearing, the Region's Hearing Officer sustained

Respondent's objections and recommended a new election. (G.C. X 2; ALJD 4:n.5).

5. The Board Certifies The Union.

The Union appealed the Hearing Officer's recommendation. On December 30, 2011, shortly after the ALJD issued in this matter, the Board issued a decision rejecting the Hearing Officer's recommendation and certifying the Union. ⁶

6. Riverside Employees Begin Union Campaign.

After the union election at the Rancho Dominguez facility, Greg Edmonds, Matthew Webster and Brandon Ojeda, installers at Respondent's Riverside facility, met with representatives of the Union at Ojeda's home to explore union representation for employees at the Riverside facility. (Tr. 181; ALJD 4:2-6).⁷ Webster said that he was interested in union representation because he thought employees should be paid on an hourly basis rather than piecework. (Tr. 241). Union authorization cards were signed that night and the three employees agreed to speak to their co-workers to see if they were interested in being represented by a union. (Tr. 79, 181). Edmonds said that after the meeting he spoke to about four employees about union representation. (Tr. 79; ALJD 4:6).

7. At A Mandatory Meeting Vice President Adrian Dimech Tries To Prevent Unionization From Spreading From Rancho Dominguez To Riverside.

⁶ DirecTV U.S. DiracTV Holdings, LLC, 357 NLRB No. 149 (December 30, 2011).

⁷ Ojeda is the only one of the three still employed by Respondent.

Mandatory meetings for all the employees were held at the Riverside facility every Saturday to discuss various work issues. (ALJD 4:9-18). Generally, Site Manager Zambrano conducted the meetings. One Saturday Adrian Dimech came to speak to the employees about the union election at the Rancho Dominguez facility. This was the first time the subject of union representation had been brought up by a company official at a meeting at Riverside. (Tr. 85-6, 183, 201; ALJD 4:21). Dimech testified that his purpose was merely to “update” the employees about the “situation” in Rancho Dominguez. However, Edmonds and others, whose testimony the ALJ credited over Dimech’s, testified that Dimech’s purpose in holding the meeting was to prevent unionization from spreading to the Riverside facility. (Tr. 290, 305; ALJD 4:23, 6:32, 13:26).

Conflicting evidence was introduced regarding when this meeting took place, and the ALJ concluded that it was unnecessary to determine the precise date that the meeting occurred. (ALJD 13; n. 28). Edmonds testified that the meeting at Ojeda’s house took place about a month before he was discharged (Tr. 78) and that the meeting where Dimech spoke occurred about a week after the meeting with Union representatives at Ojeda’s house. (Tr. 80). Ojeda testified that the meeting at his house took place on May 26, 2010⁸ (Tr. 181) and that the company meeting at which Dimech spoke took place a few months before. (Tr. 196). Although Webster was not sure of the dates, he said that the meeting at which Dimech spoke took place about a week after the meeting with Union representatives. (Tr. 243).

⁸ All dates hereafter will refer to 2010 unless otherwise indicated.

On the other hand, Dimech and Zambrano both testified that the meeting at which Dimech spoke took place on May 22. Both of Respondent's witnesses also testified that the meeting could not have occurred in June because the company was preparing to move to a new, much larger, facility in early July. (Tr. 289, 349). However, Zambrano admitted that meetings were held every Saturday, including in May and June. (Tr. 378). While both of Respondent's witnesses further testified that they knew the meeting took place on May 22 because they saw it on their calendars (Tr. 288, 349, 378), neither calendar was produced at the hearing.

Respondent made a request, which was granted, that the hearing be recessed to afford it an opportunity to obtain calendars or whatever else was available to establish the date of the meeting. Instead of producing either Dimech's or Zambrano's calendars, emails from May 22 were produced between Scott Thomas and Zambrano with the subject line "Re: Meeting this morning": the first from Thomas inquiring whether Adrian was still there, and the second from Zambrano replying that Adrian left around 9 a.m. (R. X 7).

With regard to what was said at the meeting, Installer Greg Edmonds testified that when Dimech told the employees that he wanted to prevent unionization from spreading from the Rancho Dominguez facility to other sites, he, Edmonds, disagreed, explaining that he did not believe employees' concerns would be adequately addressed without unionization. (Tr. 85; ALJD 13:28 et seq.). Dimech recalled that although several employees advocated union representation at the meeting, Edmonds and one other employee were more

vocal than the rest. (Tr. 291-2). Edmonds, Ojeda and Webster all testified that they spoke up in favor of unionization at the meeting.

The subject of union representation led to a discussion of other work issues. One issue was San Diego job assignments. Edmonds testified that he complained about San Diego assignments and how employees were paid for those jobs. (ALJD 5:4). He said that employees were being sent to jobsites in San Diego that substantially increased their drive time, and if employees went to San Diego jobs and could not complete the installation for some reason, they weren't paid for their time. Dimech told him that he would see what he could do to change that. (Tr. 87; ALJD 5:2-11).

In addition to complaining to Dimech about pay for San Diego jobs, Edmonds testified that he complained generally about installers' pay. He said that he told Dimech that installers should be paid on an hourly basis rather than by piecework. (ALJD 5:16). Dimech's response, according to Edmonds, was that decisions on pay were made by people so far above him in the management hierarchy that all he could do was make suggestions, no promises. Edmonds then replied that maybe if the employees were a collective body, the company might hear them. (Tr. 88). At that point, according to Edmonds, Dimech turned red-faced but didn't have much of a response. (Tr. 87-8). While Dimech denied becoming flustered or angry at the meeting (Tr. 292), he did not specifically deny the employees' accounts of what was said. (Tr. 246-7; ALJD 5:27-31, 47-50).

This meeting lasted about an hour. After the meeting, the employees obtained what they needed from the warehouse, walked to their vans and then

went to work. Edmonds testified that as he left the meeting, employees told him he was their hero for speaking up at the meeting. He recalled in particular that one of his co-workers, Eber Urrutia, told him he was his hero for speaking up. (Tr. 90; ALJD 6:2-3). Urrutia, a current employee who was a reluctant witness, admitted that he said something to Edmonds about speaking up at the meeting, but he couldn't recall exactly what he said. However, he claims that the gist was that he told Edmonds not to try to be a hero because "that's going to bite him in the butt." (Tr. 218; ALJD 6:2-3, n.9). Webster also confirmed that employees told Edmonds that he was their hero for speaking up. (Tr. 248).

8. Dimech Follows Edmonds To His Van After the Meeting.

After the meeting, as Edmonds reached his van, Dimech approached him. Dimech told Edmonds that he was going to address the issues that Edmonds raised at the meeting and see if he could take care of them. Edmonds volunteered that it wouldn't be necessary for a union to come in if the Employer could take care of the issues the employees were concerned about and that he knew Dimech's purpose in having the meeting was to discourage unionization. Dimech explained that there were things "in the works" but he refused to elaborate on what he meant. (Tr. 91-2; ALJD 13:30). As Dimech was leaving, he gave Edmonds his business card and asked Edmonds if he could take Edmonds' trash back to the facility and throw it away for him. Edmonds agreed and Dimech left, carrying Edmonds' empty boxes. Although Edmonds and Dimech disagreed about how long they spoke, as the ALJ noted, Dimech did not deny or contradict Edmonds' account of the conversation. (ALJD 7:2-4).

9. Respondent Improves Pay For San Diego Job Assignments.

In the week immediately following the meeting at which Edmonds complained to Dimech about pay, Respondent increased the pay for San Diego jobs for all the installers. (ALJD 14:2-3). Edmonds was personally notified of the change. One morning as Edmonds was leaving the facility for his first installation, he was stopped by a secretary who showed him a paper stating that Respondent was going to increase installers' pay for their travel time to San Diego (Tr. 93; ALJD 7:21). Later that day Dimech called Edmonds to tell him that he was going to be paid for San Diego work. (Tr. 94; ALJD 7:25).⁹

10. Zambrano Threatens to "QC" Edmonds Jobs.

The Monday or Tuesday following the Saturday meeting conducted by Dimech, according to Edmonds' testimony, which the ALJ credited, Site Manager Zambrano told him that he was going to "QC," meaning perform a quality control inspection, all his jobs that day. (Tr. 93; ALJD 14:4-9). Webster confirmed that Zambrano told Edmonds that he was going to "QC" his jobs and said that he didn't think Zambrano was joking. (Tr. 248, 251). Webster also said that he remembered Zambrano's comment because it was so bold. (Tr. 249). Zambrano, whom the ALJ discredited, denied telling Edmonds that he was going to "QC" his jobs. (Tr. 373).

⁹ Dimech did not deny making this call.

11. Edmonds Expresses His Frustration At The Wait For Supplies to Zambrano.

One of the thorniest issues employees at the Riverside facility had to face was the time spent waiting for supplies before they could begin their work. According to the Daily Agenda distributed to all employees, installers were supposed to: report to the facility each day at 6:30 a.m.; check-in with their supervisors and receive their daily route; fill out their time cards at 6:35; check out their equipment from the warehouse no later than 6:50; turn in their paperwork by 7:00; and ensure that they exit the premises and are enroute to their first appointments by 7:15-7:30. (G.C. X 4). However, they often were forced to wait for supplies at the warehouse.

Edmonds, along with several of his co-workers, frequently complained about the wait for supplies. (ALJD 7: 29 et seq.). According to Edmonds, although there was supposed to be a line, everybody bunched in and cut in front of each other. (Tr. 96). Edmonds and Urrutia said that everybody complained about the wait every day. (Tr. 96, 210-211). Ojeda also said that employees had to wait for supplies every day and that they talked about the wait. (Tr. 173). Employees complained to their supervisors, and to Zambrano, who said that there was nothing they could do. (Tr. 97). Zambrano also said that when the facility moved to larger space, which it did in early July 2010, employees would have lockers and they would not have to stand in line. (Tr. 97; ALJD 7:34). Although employees were assigned lockers after the facility was relocated, the time waiting for supplies did not change. (Tr. 98; ALJD 7:38 et seq.).

On July 21, when Edmonds arrived at the facility, after meeting with his supervisor and completing his paperwork, as he usually did, he went to the warehouse to obtain the supplies he needed for the day's assignments. A crowd of people were waiting for supplies when he arrived. According to Edmonds, about 40-60 people were talking to each other while waiting for supplies. (Tr. 100; ALJD 8:8). Edmonds continued to wait "quite some time," and he became increasingly frustrated. (ALJD 8:9). As he saw Zambrano enter the warehouse about 20-25 feet from where he was standing, he called out to him in a voice loud enough for Zambrano to hear. He said, "Hey Freddy, can't you do something about this fucking line? I stand in this fucking line 10 hours every day." (ALJD 8:14-15). Zambrano walked over to Edmonds, stretched his arms out as if to block people and said, "Oh, Greg. Nobody cut in front of Greg. Okay." Nothing much more was said, according to Edmonds, and Zambrano immediately left the warehouse. Edmonds eventually obtained his supplies and went to work. (Tr. 100-101; ALJD 8:5-18). Edmonds' outburst lasted a matter of seconds. (ALJD 8:18).

Zambrano, whom the ALJ generally discredited, did not testify directly about what was said in this exchange. (ALJD 9: n.17). Rather, he testified that he caused to be prepared an Employee Consultation Form (ECF) immediately after his conversation with Edmonds, and what is in quotation marks on the portion of the form designated the supervisor's statement accurately reflects what Edmonds said. The Supervisor's Statement in the ECF contains the following:

On Wednesday, July 21, 2010 at 7:30 AM, Greg Edmonds started yelling towards Freddy Zambrano (Operations Manager) that he

needed to "Fuckin do something about this fucken line", and that it was "Bullshit!" that he had to wait for like 10 hours, while other techs cut in front of him . I told him that I did not think that he was waiting in line for 10 hours, and that the lockers should be ready for use by this upcoming Saturday. He then continued to curse in line in front of other technicians. Thus creating an uncomfortable and hostile work environment (G.C. X 19).

12. Edmonds Is Suspended Until July 28 For Using Profanity When Complaining About The Wait For Supplies.

The day after the incident in the warehouse, Zambrano summoned Edmonds to his office and advised him that he was being suspended. Zambrano testified that he was upset with Edmonds because he cursed at him in front of other employees, not because he was complaining about the line. (Tr. 366). Although employees use profanity in the workplace, according to Zambrano, they don't direct it at a supervisor "in this fashion." (Tr. 366). Zambrano showed Edmonds the ECF he had prepared. (G.C. X 19). The "Action Plan" section of the ECF contains preprinted language stating "Immediate and sustained improvement must be shown or further disciplinary action may be taken up to and including termination." It also states that the suspension was to end on July 28. Edmonds signed the form as requested and apologized. He suggested to Zambrano that he install poles in the warehouse to make sure that there were lines rather than just a big crowd of people waiting for supplies, but Zambrano refused, saying that employees wouldn't obey regardless of what rules were imposed. (Tr. 106). When Edmonds asked if he was going to be fired, Zambrano assured him that he would not be fired and that he would be returning to work after his suspension. (ALJD 9:2-8, 42-45).

13. Employees Regularly Used Profanity In The Warehouse.

Profanity was a normal, and regular, part of the shop talk at the Riverside facility. Employees used profanity when speaking to each other as well as when speaking to supervisors and managers. Four-letter words were the norm, not the exception and at no time were employees told by their supervisors or managers to watch their language. (ALJD 3:13-26). Edmonds testified that he used profanity on a daily basis the entire time he worked for Respondent when talking with his co-workers as well as with supervisors and managers. (Tr. 35-38; ALJD 3:13-17).

Other employees corroborated Edmonds in this regard. Installer Webster, whose testimony the ALJ credited, confirmed that it was not unusual to use profanity, that it was part of the "shop talk." (Tr. 235; ALJD 3:28-37, n.2). When meeting with Field Supervisor Lamar Wilson, who was also Edmonds' supervisor, Webster said that installers would use profanity to complain to Wilson about working conditions. For example, he said that installers would say "this is fucking bullshit" and "why do we have to deal with this crap. Fuck." (Tr.234-235). Webster said that Wilson used the same language the installers used. (ALJD 3:33-35).

Webster further testified that sometimes, while he was waiting in line for supplies in the warehouse, he would see Zambrano. He said that he used profanity when speaking to Zambrano just as he did when speaking to other employees and supervisors and that Zambrano used profanity when speaking to him as well. (Tr. 238; ALJD 3:38-35)). For example, when he saw Zambrano, he

would ask Webster how it was going and Webster said that he would reply "This fucking sucks" and Zambrano would respond, "Well, you've got to fucking deal with it." (Tr. 238; ALJD 3:32-33). He testified that Zambrano and employees would use profanity not just in the warehouse or in meetings with field supervisors but also in the weekly meetings Zambrano conducted. (Tr. 239). For example, he recalled that at one meeting Zambrano complained about employees not keeping their vans clean by saying "Why aren't these fucking vans clean?" (Tr. 240; ALJD 3:34-35).

Webster also testified that Zambrano's boss, Scott Thomas, would use profanity when speaking to employees. He said that Thomas frequently would say: "We got to do our fucking jobs. These vans should be cleaned. You know, this is how we represent the company." (Tr. 240; ALJD 3:35-37).

Zambrano was the only witness for Respondent who testified about the use of profanity. Although he said that he was not aware of employees using profanity at the facility, he did not deny Webster's specific testimony, which the ALJ credited. (ALJD 3:n.2).

Zambrano further testified that, besides Edmonds, the only other employee who used profanity "against" him "in a group setting" was John Berrios, and he was fired. Zambrano said that Berrios was fired for telling off a supervisor and for using profanity after snatching a company gas card from a supervisor's hand. (Tr. 343-344; R.X. 6; ALJD 11:46-12:21).

14. Edmonds Is Told That He is Being Discharged Because of His Use of Profanity On July 21 And His History Of Allegedly Poor Performance.

a) Edmonds Is Told That He Is Being Fired Because Of The July 21 Incident And His Performance History.

On July 28 Edmonds was called to a meeting with Zambrano. As before, Cienfuegos was present as a witness for Respondent. Zambrano advised Edmonds that he was being fired because of the July 21 incident and because of his performance history. (Tr. 372; ALJD 9:17-21). According to Zambrano, even if Edmonds didn't have a single discipline in his file, he "probably" would have fired him anyway. However, he said that he took into account Edmonds' prior discipline and the fact that he was "on final warning." (Tr. 372; ALJD 10:20-30).¹⁰ He also testified that in making the decision to fire Edmonds, he consulted with his boss, Scott Thomas, and a Human Resources Representative. He said that he neither advised Scott Thomas about what happened at the Dimech meeting nor received a call from Thomas asking what happened at the meeting. (Tr. 369).

b) Edmonds' Performance History

Although Edmonds was disciplined several times before he was discharged, he was never once disciplined for anything related to conduct toward a supervisor, a co-worker, or a customer. (Tr. 51; ALJD 1032-36). With one exception, he was disciplined only for issues related to his installation skills. The first time he was disciplined, on March 3, 2008, he received a "final warning" and

¹⁰ As the ALJ noted, the record contains substantial evidence that Respondent does not have a progressive discipline procedure in the sense that the step after a "final" warning would be termination. (ALJD 10: n. 20).

suspension for causing 10 repeat service calls on jobs in two weeks. (G.C. X 8; ALJD 10:38-40). The second time he was disciplined, on February 5, 2009, he received a "written warning" for using unnecessary equipment and not grounding a system properly. (G.C. X 9; ALJD 10:40-42). The third time, on March 20, 2009, he was issued a "final warning" for using existing cable on a new install. (G.C. X 10; ALJD 10: 42-11:2).

In the middle of June 2009 Edmonds was promoted from Installer to Service Technician. However, on October 23, 2009, after his promotion, he was issued a "written warning" for failing to replace all unapproved connectors. causing a repeat service call. (G.C. X 11). Next, on November 4, 2009, he received a "verbal warning" for a driver's call report. (G.C. X 12 (a) and 12(b)). In November 2009 Edmonds, along with four other service technicians, was demoted from service technician to installer for failing to complete the requisite number of installations. Next, on January 8, 2010, he received a "final warning" for an unsatisfactory satellite installation. (G.C. X 13; ALJD 11:6-8). On January 21, 2010, he was suspended for failing to pre-call customers. (G.C. X 14; ALJD 11:8-9). On March 13, 2010, he received a verbal warning for failing to acknowledge his time sheet. (G.C. X 15 (a) and 15(b); ALJD 11:8-9). Finally, on June 17, 2010, Edmonds was suspended pending investigation for causing an

“OOP escalation”¹¹ for a certain amount, but he was reinstated with pay after an investigation.¹²

Edmonds testified that some of the discipline he received was deserved and some was not. (ALJD 11:10-11). For example, he did not believe it was fair that he was issued a “final warning” and a suspension the first time he was disciplined; and the discipline was for causing excessive service calls, because service calls are caused by a variety of reasons, many of which have nothing to do with the quality of the employee’s work. (Tr. 51). However, other than speaking to Zambrano who, according to Edmonds, usually sided with the supervisor, he was not aware that he had any recourse. (Tr. 63, 74). The open-door policy described in the employee handbook states that if an employee believes that he has not been treated in accordance with company policy, the employee may bring his concerns to another manager or a human resources representative. While acknowledging that he was given a copy of the employee handbook, Edmonds testified that he was not aware of this possibility. (Tr. 127). Zambrano confirmed that there were no human resources representatives employed at the Riverside facility. (Tr. 406).

Although Edmonds was disciplined for performance deficiencies while employed by Respondent, Edmonds was also commended in several ways. His hourly wage increased from the starting grade of 11, to 12 in February 2008 (G.C. X 6), and to the top grade of 13 just before he was discharged. (Tr. 112;

¹¹ An “OOP escalation” refers to a complaint made by a customer to the office of Respondent’s president (Tr. 354).

¹² Although Edmonds was reinstated with pay as a result of Respondent’s investigation, he was compensated only at his designated hourly rate which is less than he would have earned on a piecework basis if he had not been suspended (Tr. 450).

ALJD 2:48, 11:20). In addition to being promoted to service technician in June 2009 for approximately five months, he was also commended for his performance on June 21, 2009, at a staff meeting. (G.C. X 18).

Edmonds also testified that in about May 2010 Zambrano suggested that he apply for a supervisory position. Edmonds said that he considered applying but decided not to apply after completing the application. Although Zambrano denied suggesting that Edmonds apply for a supervisory position, the ALJ credited Edmonds. (ALJD 11: n. 23).

Employees' performance is measured every pay period, both individually and as a facility, for the past 30-, 60- and 90-day periods. In the pay period immediately preceding Edmonds' discharge, as well as one in March 2010, Edmonds' customer satisfaction rating was 100, whereas the facility's rating was only 89. (G.C. X 21 and 22, Tr. 108-111; ALJD 11:35-44).

B. THE COMPANY RULES.

1. The Rules in the Home Service Employee Handbook.

On May 22, 2010, by distributing to employees at the Riverside facility a handbook, entitled Home Services Employee Handbook, Respondent promulgated and since then has maintained the following rules:¹³

2.4 Use of Company Systems, Equipment, and Resources

Occasional and reasonable personal use of company property is permitted. Examples of reasonable use include use that is moderate and appropriate in duration and frequency, use that does not involve obscene or questionable subject matter, use that does

¹³ ALJD 16:12-17:13.

not conflict with the company's Anti-discrimination/Harassment and/or conflict of interest policies, and use that is not in support of any religious, political, or outside organization activity.

3.4 Communications and Representing DIRECTV

To ensure the company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communications:

- Do not contact the media, and direct all media inquiries to the Home Services Communications department.
- If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.

4.3.1 Confidentiality

- Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs, and chat rooms
- Never give out information about customers or DIRECTV employees. In particular, customer information must never be transmitted through regular unencrypted email, even internally within DIRECTV. If you have additional questions regarding data transmission guidelines, check with the IT department.

2. The Rules in the DirecTV Policy Communications Public Relations, and Corporate Events.

Since at least on or about July 1, 2010, Respondent has maintained, in the DirecTV Policy Communications, Public Relations, and Corporate Events document, the following rules:

Employees

Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.

Public Relations

Employees must direct all media inquiries to a member of the Public Relations team, without exception. Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations. These rules are in place to ensure that the company communications [sic] a consistent message and to ensure that proprietary information is not released.

3. Respondent's Attempted Repudiation

In a memo directed to DTVHS Riverside Employees that was posted on the notice board in the warehouse at the Riverside facility on about May 9, 2011,¹⁴ Dimech clarified Respondent's intent in enforcing policies set forth in the employee handbook and company policies posted on the DEN, which is Respondent's intranet. (Tr. 286, R.X 4 (a); ALJD 17:15-18:32). The DEN is accessible to all home-services employees throughout the United States. (Tr. 311). Dimech's memo was also posted on the DEN at approximately the same time. (Tr. 320, R. X 4(b), 4(c), 5). The memo states the following:

Employee Handbook

The policies contained in the DTVHS Employee Handbook previously distributed to you (including but not limited to confidentiality, using social media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

¹⁴ The Complaint in this case issued on April 25, 2011.

Company Policies

The company policies posted on the DEN (including but not limited to confidentiality, using social media) will not be used to prohibit, discourage or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wage, hours or working conditions.)

If there should be any questions regarding this, please see your Human Resources Representative.

IV. ARGUMENT

A. THE ALJ CORRECTLY CONCLUDED THAT EMPLOYEE GREGORY EDMONDS' UNION ACTIIVITY WAS A MOTIVATING FACTOR IN RESPONDENT'S DECISION TO DISCHARGE HIM.

1. Introduction and Applicable Principles

The ALJ concluded that employee Gregory Edmonds was discharged for engaging in union activity. It is settled that if an employer disciplines or discharges "an employee for having engaged in union activities and has no other basis for the discharge, or the reason he proffers are pretextual," the employer violates Section 8(a)(1) and (3) of the Act. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), approving the Board's analysis in Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083 (1980), enf'd on other grounds, 652 F. 2d 899 (1st Cir. 1981). The Supreme Court has affirmed as a uniform, national standard, that where an employer's opposition to union or other protected concerted activity has been shown to be a *motivating factor* in a decision to take adverse action against an employee, the employer will be found to have violated the Act unless it is able to demonstrate that the adverse action would have taken place even in the absence of protected concerted activity.

A *prima facie* case is presented when the General Counsel establishes: (1) union activity, (2) employer knowledge of the employee's union activity, (3) animus toward the union activity, and (4) causation. Thereafter, the burden shifts to the employer to demonstrate that it would have taken the same action in the absence of union activity. If the reasons proffered by an employer for discharging an employee are not supported by the credible evidence and are, therefore, pretextual, the Board finds both that the employer has not met its burden of proving that the adverse action would have taken place in the absence of the employee's union activity and also that the employer's motivation is unlawful. BMD Sportswear Corp., 283 NLRB 142 (1987). Timing of the employer's decision in relation to the employee's union activity is often dispositive. Limpert Brothers, 276 NLRB 364 (1985). As shown below, although Respondent argues that the ALJ improperly concluded that the union animus was a motivating factor in Respondent's decision to discharge Edmonds, the record contains ample, probative evidence to establish that union activity was a motivating factor in Edmonds' termination.

2. The Prima Facie Case

a) Respondent's Knowledge of Edmonds' Union Activity

Edmonds' union activity at issue in this case involves his vocal support for unionization at a meeting conducted by Adrian Dimech, Respondent's Vice President. Although Dimech testified that "he scheduled the meeting as a 'courtesy' to the employees to update them on the union situation at the Rancho

Dominguez facility,”¹⁵ based on the employees’ testimony, which the ALJ credited, Dimech’s purpose was “to keep the Union’s efforts at Rancho Dominguez from spreading to the Riverside facility.”¹⁶

The record contains credible, uncontradicted evidence to establish that Edmonds directly challenged Dimech at that meeting, which was attended by all the supervisors and managers, including Site Manager Freddy Zambrano, and expressed his support for unionization of employees at the Riverside facility. In its exceptions Respondent argues that other employees, not just Edmonds, spoke out in support of unions at the meeting, and they were not discharged. While Edmonds was not the only employee who spoke at the meeting, everyone who testified about the Dimech meeting confirmed that Edmonds was outspoken in his support for unions. Edmonds, whose testimony in this regard was corroborated by his co-workers, Urrutia and Webster, testified that after the meeting employees even came up to him and told him he was their hero. (ALJD 6:2-3).

Respondent’s witnesses did not contradict the employees in this regard. (ALJD 6:47-7:11). Both Zambrano and Dimech, the two witnesses for Respondent who testified about the meeting, said that Edmonds was one of the two or three most vocal in the meeting and that he expressed his support for unions at this meeting. Zambrano even recalled that Edmonds said that he had been a member of a cable workers union and liked it. (Tr. 384).

¹⁵ ALJD 6:32-33.

¹⁶ ALJD 13:25-28.

Edmonds' support for unionization at this meeting was not perceived as innocuous by Respondent's managers, Dimech and Zambrano. Dimech's pursuit of Edmonds immediately after the meeting, including engaging Edmonds in an extended private conversation at his van, giving Edmonds his business card, and even removing Edmonds' trash for him, demonstrate that Respondent considered Edmonds' comments about the Union and about pay issues to be important. (ALJD 13:27-30). In addition, San Diego pay was changed as a result of Edmonds' comments at the meeting. Although Dimech denied that Edmonds' complaint caused the San Diego pay increase, as the ALJ noted, a few days after Edmonds vocalized his complaints about pay at the Dimech meeting, not only was pay increased for San Diego routes but Dimech personally called Edmonds to "give him the news." (ALJD 14:2-4).

The record contains substantial, credible evidence that Zambrano also paid close attention to Edmonds' vocal support for unionization at the meeting. On a workday following the meeting, about the same time that Dimech called Edmonds to tell him about the pay increase, Zambrano stopped Edmonds in the morning and told him all of his jobs would be "QC'd," meaning quality control inspections would be performed on them. Zambrano, in effect, told Edmonds that from then on all of his work would be kept under surveillance. Although Zambrano testified in response to a leading question from Respondent's attorney, that he could not recall making this statement, he did not expressly deny it, and the ALJ credited Edmonds and his co-worker that right after

Edmonds expressed his support for unionization, Zambrano warned him that he was going to be kept under surveillance. (ALJD 7: n.10).

It is established Board policy not to set aside an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). There is no basis to set aside the ALJ's decision to discredit Zambrano in this regard and credit Edmonds and Webster, because these credibility resolutions are based on his observations of the witnesses' demeanor, and the record evidence. Specifically, the ALJ concluded that Zambrano frequently gave succinct responses to leading questions posed by Respondent's attorney in a manner tailored to benefit Respondent. (ALJD 9: n.17).

The record evidence supports the ALJ's credibility resolutions. In this regard, Edmonds' and Webster's testimony was much more specific. Their recounting of the incident was detailed and specific, whereas Zambrano rarely gave more than a "yes" or "no" answer to his attorney's leading questions. In short, the record contains ample, uncontradicted evidence that Respondent knew of Edmonds' union activity and support and paid attention to it.

b) Respondent's Animus

Although Respondent argues that the record is devoid of evidence of union animus, the record in this case contains uncontradicted evidence of Respondent's animus towards union activity. Initially, it is clear that Respondent mounted a vigorous anti-union campaign at the nearby Rancho Dominguez facility (G.C. X 2). The uncontradicted evidence establishes that as soon as the

Union filed its petition for an election at the Rancho Dominguez facility, Respondent required the employees and supervisors at that facility to attend meetings during which it explained its opposition to the Union campaign. These meetings were neither brief nor casual affairs. Former Supervisor Noe Gallegos testified that before holding meetings for employees, Respondent conducted two meetings for supervisors. He further testified that on two separate occasions before the union election at Rancho Dominguez, about two weeks apart, he was asked by Lidia Cossi, one of Respondent's attorneys, to gauge the amount of support the technicians on his team had for the union. He testified that after the union election Dimech also asked him to identify the supervisors and employees who supported the Union, promising him immunity from discharge for his answers. Although Dimech testified that he just asked Gallegos about the identity of supervisors who supported the union, not of employees who supported the Union, the ALJ credited Gallegos who testified in a forthright, direct manner. (ALJD 4: n.5). As explained above, the Board's established policy is not to overturn an ALJ's credibility resolutions unless the clear preponderance of the evidence convinces them that they are not correct. Standard Drywall Products, supra. Because the ALJ gave a reasoned analysis for why he credited Gallegos over Dimech, there is no basis for overturning his credibility resolution.

Although the record contains no evidence that Respondent conducted a series of meetings with employees at the Riverside facility to explain its opposition to unionization as it did in Rancho Dominguez, or that it interrogated Riverside field supervisors about the level of union support of employees on their teams, the record contains uncontradicted evidence that Respondent sent Dimech to the Riverside facility to tell the employees about the union campaign at Rancho Dominguez and, of course, to explain to employees Respondent's opposition. Edmonds testified that Dimech told the employees that his purpose

was to prevent unionization from spreading to other sites. While Dimech did not expressly testify that that was his purpose, he essentially admitted as much. He testified not only that Respondent opposed unionization at the Rancho Dominguez facility, but also that the union election at Rancho Dominguez was common knowledge within the entire region, and that his purpose in speaking to the employees at Riverside was to update them about what was going on in Rancho Dominguez (Tr. 304). Based on this testimony, the ALJ concluded that Dimech's purpose in speaking to the Riverside employees was as follows:

It is clear from the remarks Dimech made during his meeting with the Riverside employees that he was not there simply as a "courtesy" to update them on the union election at the Rancho Dominguez facility. Rather, I find, he was there to keep the Union's efforts at Rancho Dominguez from spreading to the Riverside facility, or to stop a union campaign that he believed had already begun. (ALJD 13:23-27).

Accordingly, the record fully supports the ALJ's finding that, by conducting a meeting with all the employees at Riverside, Respondent communicated its opposition to unionization in an effort either to prevent a union campaign from starting or to stop one that had already begun.

Zambrano's promise to "QC" Edmonds' jobs, made on the first workday after the Dimech meeting, as shown above, reinforced Dimech's antiunion message. By telling one of the most vocal union advocates right after he expressed his union support that his work was going to be scrutinized, Zambrano emphasized Respondent's opposition to unionization. Moreover, Zambrano did not make this statement to Edmonds in the privacy of his office. Rather, he made it at the warehouse where it was overheard by Edmonds' co-worker, Webster.

Respondent also argues that the record is devoid of evidence of animus because there was no evidence of personal hostility between Zambrano and

Edmonds. They may have had a cordial relationship, but that is not the test for determining union animus. Section 8(a)(3) outlaws employer action that is directed towards encouraging or discouraging union membership. While employer action that discourages union membership may be accompanied by personal animosity between the parties, Section 8(a)(3) is focused on discouraging union membership, and makes no mention of personal feelings between a supervisor and an employee.

In short, contrary to Respondent's claim that the record contains no evidence of union animus, and absolutely none on the part of Zambrano, the person whom Respondent asserts was the decision-maker in Edmonds' discharge, the record is replete with evidence of animus, including evidence of Zambrano's participation.¹⁷ Respondent also argues that the ALJ improperly inferred animus from the testimony of Noe Gallegos, a field supervisor at the Rancho Dominguez facility, whom Respondent claims, testified that Dimech, the company official who also spoke to the Riverside employees, interrogated him about whether he could identify other field supervisors who supported the union, not employees who supported the union. Although Gallegos did admit on cross-examination that Dimech asked him to identify field supervisors who supported the union campaign, he repeatedly testified that Dimech asked him to identify employees, as well as field supervisors, who were involved either in union organizing or in supporting the union campaign there. (Tr. 269-273). What Respondent failed to address, however, is that the ALJ credited Gallegos, who testified that, in addition to asking him to identify supervisors and employees who supported unionization, Dimech warned him that if the Union were to come in,

¹⁷ Although Respondent asserts that Zambrano was the decision-maker with regard to Edmonds' discharge, Zambrano admitted that when making the decision to fire Edmonds, he consulted with his boss, Scott Thomas, who reports to Dimech, and with a human resources person. (ALJD 15:20-22).

the site could possibly be closed and the work given to contractors. (Tr. 262; ALJD 4: n.5). Thus, the record contains substantial evidence of union animus.

c) Causation

In light of the evidence of Respondent's knowledge of Edmonds' support for unionization at the Riverside facility, as well as the evidence that Respondent sent its vice president to speak to Riverside employees to prevent the union campaign from spreading there and that its vice president and site manager immediately and forcefully responded to Edmonds' union advocacy, the record amply demonstrates a nexus between Edmonds' union activity and his discharge.

3. The Pretextual Nature of Respondent's Justification.

When the reasons proffered by an employer for firing an employee are not supported by the credible evidence and are, therefore, pretextual, the Board finds both that the employer has not met its burden of proving that the discharge would have taken place in the absence of the employee's union or other protected concerted activity and that the employer's motivation is unlawful. BMD Sportswear, 283 NLRB 142 (1987). The Board finds that proffered reasons are pretextual when they don't exist or are not in fact relied upon. Bardaville Electric, 309 NLRB 337 (1992).

a) Edmonds' Performance

Employers frequently assert that an employee's poor performance is the reason for the discharge. If an employee recently received a wage increase, a promotion, or a good evaluation, the Board often finds that the employer's asserted justification was pretextual. See, e.g. Gatliff Coal Company, 301 NLRB 793 (1991).

Respondent asserts that Edmonds was fired in part because of his poor performance. While Edmonds' work performance was not perfect, Respondent was not displeased with his performance in the period immediately prior to his discharge. The uncontradicted evidence establishes that he was promoted to the highest level of pay just before he was discharged and that his customer satisfaction rating was 100 for over a year, much higher than the rating of others at his facility.¹⁸ Edmonds also testified that less than two months before he was fired Zambrano suggested that he apply for a supervisory position. Although Zambrano denied making the suggestion, and attempted to dispute Edmonds' testimony with documentation, the ALJ credited Edmonds in this regard, who produced the actual document he completed to apply for the supervisory promotion. (ALJD 11: n.23).

It is established Board policy not to set aside an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence

¹⁸ According to Edmonds' Performance and Compensation Statements for the weeks ending March 5, 2010, and June 25, 2010, Edmonds' score was 100 for those pay periods and 100 for the past 12 months prior to March 5, 2010, and 98.87 for the 12 months prior to June 25, 2010, well exceeding the average for his facility in the preceding year. (ALJD 15: n.31; G.C. X 21 and 22).

convinces the Board that they are incorrect. Standard Dry Wall Products, supra. There is no basis to set aside the ALJ's credibility resolutions in this regard because they are based on his observations of the witnesses' demeanor, and the record evidence. Specifically, the ALJ concluded that Zambrano frequently gave succinct "yes" or "no" responses to leading questions posed by Respondent's attorney in a manner tailored to benefit Respondent. (ALJD 9: n.17). Edmonds' recounting, on the other hand, was detailed and specific. Moreover, as noted above, the record contains more than one positive indication of Edmonds' performance. Not only did Zambrano suggest that Edmonds apply for a supervisory position, but Edmonds reached the highest pay level an installer could earn two weeks before his discharge, his customer satisfaction statistics were high when Zambrano recommended that he apply for a supervisory position, and he received no adverse counseling forms in the five months before his discharge. Accordingly, the record fully supports the ALJ's credibility resolution.

In short, while Edmonds' performance was not perfect, the credible evidence in the record establishes that in the period preceding his discharge, Respondent was pleased with his performance and, therefore, that Edmonds' assertedly poor performance was just a pretext.

The record also establishes, as the ALJ noted, that Respondent did not initially decide to fire Edmonds when he complained to Zambrano about the wait for supplies. Rather, Zambrano made it very clear to Edmonds, both verbally and in writing on the form he gave Edmonds, that he was being suspended for a

finite period of time. Moreover, when Zambrano fired Edmonds, he did not write anything about his prior performance issues on the form he gave Edmonds. Instead, he said that he had spoken with his superior, Scott Thomas, who also reported to Adrian Dimech. Thus, the record fully supports the ALJ's conclusion that Respondent's explanation for the decision to convert Edmonds' suspension to a discharge was pretextual. (ALJD 15: 14-35).

b) The Timing of Edmonds' Discharge

Timing is often an important factor in establishing motivation. Limpert Brothers, supra. Obviously, the closer in time an employer learns of an employee's union activity to the employee's discharge, the more likely it is that the discharge was motivated by the employee's union activity. When an employee is discharged soon after engaging in union activity, the Board often infers that an employer's asserted reasons are pretextual and that the real reason was the employee's union or other protected concerted activity. It is the Counsel for the Acting General Counsel's position that the credible, probative evidence establishes that Edmonds spoke up at a meeting before he was discharged and that Respondent seized on his use of profanity as an excuse to fire him.

Noting that the record contains conflicting evidence on exactly when the meeting at which Edmonds vocalized his union support took place, the ALJ concluded that under the circumstances it was unnecessary to determine the precise date. (ALJD 13: n. 28). Edmonds testified that he was fired less than a

month after the meeting at which he advocated unionization at the Riverside facility. Although Respondent's witnesses testified that the meeting took place two months before Edmonds' discharge, on May 22, 2010, the testimony of Respondent's witnesses in this regard is not credible. While Dimech and Zambrano both testified that they knew the meeting took place on May 22, 2010, because their calendars contained notations about the meeting, neither calendar was produced. When a party fails to produce evidence within its control, it is appropriate to draw an adverse inference. RCC Fabricators, Inc., 352 NLRB 701, n. 5 (2008). Accordingly, it is appropriate to infer from Respondent's failure to produce the calendars that the calendars either do not exist or do not reflect that Dimech attended an employee meeting at the Riverside facility on May 22, 2010.

Instead of producing either Zambrano's or Dimech's calendars, Respondent instead produced four separate emails, not in direct chronological sequence, purportedly sent on May 22, 2010: three from Regional Manager Scott Thomas to Zambrano; and one from Zambrano to Thomas. None of these emails state that Dimech spoke at an employee meeting on May 22, 2010. While the emails are some evidence that Dimech was present at the Riverside facility on May 22, 2010, and that a meeting took place on May 22, 2010, at which techs repeated their complaints about San Diego, they do not state that Dimech spoke at the meeting. Because Dimech also testified that he regularly visited the Riverside facility (although he conveniently could not recall any of the dates),

Respondent's emails do not establish that the meeting at which Dimech spoke to the employees took place on May 22, 2010.

In addition to asserting that the meeting took place on May 22 because they made notations on their calendars, Zambrano and Dimech also placed the meeting on May 22, 2010, because they said that the meeting could not have occurred in June when the facility was preparing to move to much larger quarters on July 4. If Dimech could not have spoken at a meeting in June because the facility was getting ready to move, presumably no meetings would have been held in June. However, Zambrano testified that he continued to conduct his regular Saturday meetings throughout the month of June. Because Dimech spoke at one of his regular Saturday meetings, there is no reason to think he did not speak at a Saturday meeting in June rather than on May 22. Accordingly, the credible evidence establishes that the meeting at which Edmonds spoke occurred less than a month before the July 21 incident that precipitated his discharge.

Assuming *arguendo* that the meeting at which Dimech spoke took place on May 22, not more than a month later, the record still supports the conclusion that Respondent seized on the very first opportunity it had to fire Edmonds. Respondent claims in its exceptions that if it were motivated to fire Edmonds for unlawful reasons, it would have fired him in June when he was suspended for an "OOP escalation" (G.C. X 16).¹⁹ Respondent asserts that although it could have fired him, Zambrano conducted a thorough investigation and ultimately

¹⁹ Respondent also asserts that it could have fired Edmonds because of a car accident but the record contains no evidence that involvement in an accident is grounds for immediate termination.

exonerated him. While Respondent introduced evidence that Zambrano did conduct an investigation, and that Edmonds was paid at an hourly rate for the days he was suspended, that was the first time Edmonds had ever been exonerated after an investigation. Indeed, it was the first time that an investigation had even been conducted. Given the thoroughness of the investigation,²⁰ it is just as likely that Respondent conducted such a thorough investigation because of concern about Edmonds' union activity. Certainly Zambrano did not hesitate to suspend Edmonds before conducting the investigation, and Edmonds was not fully compensated for the days he was suspended. In short, whether the meeting with Dimech took place on May 22 or a month later, the record contains probative evidence that Respondent seized on the very first opportunity to fire Edmonds.

c) Edmonds' Use of Profanity

In its exceptions Respondent asserts that Edmonds' discharge for the use of profanity was consistent with the way it treated other employees. Although Respondent introduced disciplinary records for other employees who had been terminated for using profanity, only one of the other employees was even employed at the Riverside facility. That employee, John Berrios, was fired not just for using profanity but for much more serious behavior. Not only did he repeatedly disobey his supervisor's instructions, he snatched a company gas card from the supervisor's hand, refused to give up his van and on a prior

²⁰ As part of the investigation, Edmonds was asked for his phone records and Zambrano checked all his calls for the afternoon in question. (G.C. X 16(d)).

occasion refused to follow a supervisor's instructions (ALJD 11:46-12:21; R. X 6 (e), 6(h)).

The records of other employees who were fired for using profanity who worked at other facilities also do not support Respondent's claim that its termination of Edmonds was consistent with the way it treated other employees who used profanity. One of the other employee records involved a dispatcher (R. X 10), another involved an employee who called his supervisor a "f**** coward" (R. X 11), another involved an employee disciplined five times in the two previous months who repeatedly used profanity in an office and then stormed into a training room where five other employees were seated (R. X 13), and others do not indicate what specific language was used (R. X 12 and 14).

Other facilities may not have tolerated profanity to the extent it was tolerated at the Riverside facility. Although Zambrano testified that he did not use profanity when speaking to employees except occasionally alone in his office behind closed doors, Zambrano's testimony in this regard should not be credited because he gave only conclusionary testimony,²¹ responding to his attorney's leading questions with yes and no answers, which is entitled to little weight. Champion Rivet Company, 314 NLRB 1097 (1994). Moreover, on the one occasion in which he admitted using profanity—in his office with Ojeda—contrary to what he said, he was not alone. According to Ojeda, Supervisor Lamar Wilson was also present.

With the exception of Ojeda, everyone else contradicted Zambrano. Edmonds and Webster testified extensively about the regular use of profanity at

²¹ See Tr. 341.

the facility by employees and supervisors alike. Webster testified that both Zambrano and his boss, Thomas, used profanity at meetings and even recalled what they said. Webster, for example, testified that at a meeting Zambrano said, "Why aren't these fucking vans clean?" (ALJD 3: 34). Ojeda, a current employee, who testified that he only heard Zambrano use profanity in his office, vacillated about whether profanity was used at the facility, at first testifying that he heard the "f" word and that very few people said "bullshit" but later he took the "fifth" when asked about the frequent use of the "f" word (Tr. 171, 203). Ojeda was visibly upset at having to testify, at one point saying that he was being put in a "bad spot" so he has to answer "the way he needs to" (Tr. 177), and should not be credited. However, even Ojeda contradicted Zambrano when he testified that his supervisor was present in addition to Zambrano in the meeting at which he and Zambrano used the "f" word. In short, the credible evidence shows that Edmonds' use of profanity and poor performance were pretextual reasons and the real reasons for Edmonds' discharge were his union activity and complaint about the wait for supplies.

B. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT'S RULES VIOLATE SECTION 8(A)(1) OF THE ACT.

The ALJ concluded that various rules maintained by Respondent in its Employee Handbook and a document entitled DirecTV Policy Communications, Public Relations, and Corporate Events regarding communications with the media, law enforcement, confidentiality of job information, and mentioning job information in blogs, chat rooms, or public websites violate Section 8(a)(1) of the

Act. (ALJD 18: 36- 19-10). Relying on Flamingo Hilton-Laughlin, 330 NLRB 287 (1999), and Lafayette Park Hotel, 326 NLRB 824 (1998), the ALJ held that these rules and policies would reasonably tend to inhibit union or other protected concerted activity because they preclude employees from communicating about their wages, hours and conditions. Although Respondent argues in its exceptions that the ALJ did not make a finding that employees would reasonably construe these rules to prohibit Section 7 activity, the ALJ expressly held:

I find that handbook provisions 3.4 Communications and Representing DIRECTV, and 4.3.1 Confidentiality, are unlawful on their face, as they would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, by precluding employees from contacting or conferring with representatives of the media, and by causing employees to be reluctant to contact the Board or deal with Board agents. ...I find that the Policy document provisions titled Employees and Public Relations are unlawful on their face as they would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, through the internet and by other means, and by precluding employees from contacting or conferring with representatives of the media.

Accordingly, the Respondent's exceptions in this regard have no merit.

C. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT'S DISCLAIMERS DO NOT EFFECTIVELY REMEDY THE VIOLATIONS OF SECTION 8(A)(1) OF THE ACT.

On about May 9, 2011, approximately two weeks after the complaint issued in this matter,²² Respondent posted the following at the Riverside facility and on its intranet

Employee Handbook

The policies contained in the DTVHS Employee Handbook previously distributed to you (including but not limited to confidentiality, using social media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions.)

Company Policies

The company policies posted on the DEN (including but not limited to confidentiality, using social media) will not be used to prohibit, discourage or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wage, hours or working conditions.)

Relying on Passavant Memorial Area Hospital, 237 NLRB 138 (1978), the ALJ held that "Respondent's disclaimers and corrective action are insufficiently specific and/or would be overlooked by employees reading the particular provisions in the written documents." (ALJD 19:12-14).²³ In its exceptions Respondent argues that its disclaimers clearly correct any misunderstanding that the policies in question could be reasonably construed to prohibit Section 7 activity and complains that the ALJ gave no reason to support his conclusion to the contrary. While the ALJ did not provide a detailed analysis, the ALJ cited

²² The Complaint issued on April 25, 2011.

²³ The Acting General Counsel filed exceptions to the ALJ's relegation of the remedy for Respondent's rules violations to the compliance stage.

Passavant, the leading case, and offered two reasons why the disclaimers were not effective: (1) they were insufficiently specific; and (2) they would be overlooked by employees reading the documents.

For a respondent to successfully claim that it has remedied a violation of the Act, it must meet the test set forth in Passavant Memorial Area Hospital, supra. Ark Las Vegas, 335 NLRB 1284, 1289 (2001). In Passavant, the case cited by the ALJ, the Board held that for a repudiation to be effective, it must be timely, unambiguous and specifically refer to the unlawful conduct it is attempting to remedy. Moreover, in Holly Farms, 311 NLRB 273, 274 (1993), the Board held that the employer must admit wrongdoing.

Because Respondent's repudiation does not meet the standards enunciated in Passavant and its progeny, the ALJ correctly concluded that Respondent's maintenance of the aforecited rules continues to violate the Act. The notice Respondent posted on May 9, 2011, which was posted at the Riverside facility and on its Intranet, was posted approximately two weeks after the complaint issued, and was not posted at any facility besides Riverside. The notice also does not expressly mention all of the rules at issue. While it mentions rules regarding confidentiality and social media, it omits reference to the rules regarding use of company systems, equipment and resources, contact with the media and law enforcement, and public relations. The notice also does not admit any wrongdoing; nowhere has Respondent conceded that the rules were unlawful before its attempted remedy. Accordingly, the ALJ correctly concluded

that Respondent's disclaimer does not effectively remedy the violations of Section 8(a)(1) of the Act.

V. REMEDY

Counsel for the Acting General Counsel submits that the following order is the appropriate remedy:

1. That Respondent, DirecTV U.S. DirecTV Holdings, LLC, its officers, agents, successors and assigns, be ordered to cease and desist from engaging in any of the following because employees engaged in activity in support of International Association of Machinists and Aerospace Workers, District Lodge 947, AFL-CIO, herein called the Union, or any other labor organization, or any other protected concerted activity:

(a) Discharging employees;

(b) Cease maintaining rules that interfere with employees' rights to engage in activity protected by Section 7 of the Act; and

(c) In any similar way frustrating employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. That Respondent be ordered to take the following affirmative action:

(a) Offer, in writing, immediate and full reinstatement to Greg Edmonds to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of pay and other benefits resulting from his discharge with interest including reimbursement of

amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination;²⁴

(b) Submit appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods;²⁵

(c) Expunge from its files any reference to the discharge of Greg Edmonds, and notify him in writing that this has been done and that evidence of this unlawful conduct will not be used against him in any way;

(d) Rescind the following rules contained in its Employee Handbook at every location where the Employee Handbook has been distributed and on its intranet and notify employees that the rules have been rescinded to the same extent that the unlawful rules were publicized:

2.4 Use of Company Systems, Equipment, and Resources

Occasional and reasonable personal use of company property is permitted. Examples of reasonable use include use that is moderate and appropriate in duration and frequency, use that does not involve obscene or questionable subject matter, use that does not conflict with the company's Anti-discrimination/Harassment and/or conflict of interest policies, and use that is not in support of any religious, political, or outside organization activity.

3.4 Communications and Representing DIRECTV

To ensure the company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communications:

- Do not contact the media, and direct all media inquiries to the Home Services Communications department.
- If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact

²⁴ The ALJ failed to include this provision in his recommended order.

²⁵ The ALJ failed to include this provision in his recommended order.

with law enforcement agencies and any needed coordination with DIRECTV departments.

4.3.2 Confidentiality

- Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs, and chat rooms
- Never give out information about customers or DIRECTV employees. In particular, customer information must never be transmitted through regular unencrypted email, even internally within DIRECTV. If you have additional questions regarding data transmission guidelines, check with the IT department.

(d) Furnish all current employees with inserts for the Employee Handbook that (1) advise that the unlawful rules and policy have been rescinded, or (2) provide the language of lawful rules or policy; or publish and distribute a revised Employee Handbook that (1) does not contain the unlawful rules and policies, or (2) provides the language of lawful rules or policy.

(e) Rescind the following rules contained in the DirecTV Policy Communications, Public Relations, and Corporate Events at every location where the said Policy has been distributed and on its intranet and notify employees that the rules have been rescinded to the same extent that the unlawful rules were publicized:

Employees

Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.

Public Relations

Employees must direct all media inquiries to a member of the Public Relations team, without exception. Employees should not contact or comment to any media about the company unless pre-

authorized by Public Relations. These rules are in place to ensure that the company communications [sic] a consistent message and to ensure that proprietary information is not released.

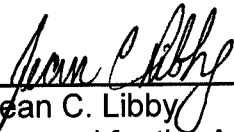
(f) Furnish all current employees with inserts for the DirecTV Policy Communications, Public Relations, and Corporate Events that (1) advise that the unlawful rules and policy have been rescinded, or (2) provide the language of lawful rules or policy; or publish and distribute a revised Employee Handbook that (1) does not contain the unlawful rules and policies, or (2) provides the language of lawful rules or policy.

(g) Post, within 14 days after service by the Region, at every location where the Employee Handbook Communications Policy has been distributed and on its intranet an appropriate notice to employees delineating the Section 8(a) (3) and (1) violations;

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay owed under the terms of this Order; and

(i) Notify the Regional Director for Region 21, in writing, within 20 days from the date of the Board's Decision and Order, what steps have been taken to comply with the Order.

Respectfully submitted,



Jean C. Libby
Counsel for the Acting General Counsel
National Labor Relations Board, Region 21

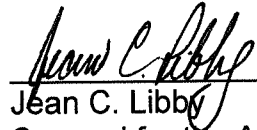
STATEMENT OF SERVICE

I hereby certify that a copy of the Counsel for the Acting General Counsel's **Answering Brief to Respondent's Exceptions** in Case 21-CA-039546 was submitted by E-filing to the National Labor Relations Board, Washington, D.C., on February 21, 2012. The following parties were served with a copy of the same Brief by electronic mail:

Gregory D. Wolflick, Attorney at Law
Wolflick & Simpson
130 North Brand Boulevard, Suite 410
Glendale, CA 911203
(E-mail: greg@wolfsim.com)

David A. Rosenfeld, Attorney at Law
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
(E-mail: DRosenfeld@unioncounsel.net)

Respectfully submitted,



Jean C. Libby
Counsel for the Acting General Counsel
National Labor Relations Board, Ninth Floor
888 S. Figueroa St., Ninth Floor
Los Angeles, CA 90017-5449
Jean.libby@nrlrb.gov